No. 72.

NOV 24 1902
JAMES H. McKENNEY
Clerk.

Supp. Br. of Wolcott & Vaile for D. C.

Filed Nov. 24, 1902.

IN THE

SUPREME COURT

OF THE

UNITED STATES

No. 72. October Term, 1902.

THE TELLURIDE POWER TRANSMISSION COMPANY AND L. L. NUNN,
Plaintiffs in Error,

vs.

THE RIO GRANDE WESTERN RAILWAY COMPANY,
Defendant in Error.

SUPPLEMENTAL BRIEF IN BEHALF OF DEFENDANT IN ERROR.

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J. F. VAILE,
Attorneys for Defendant in Error.

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SUPPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Upon the oral hearing in this case the court granted each of the parties leave to file supplemental briefs; and under this permission we shall make some response to the supplemental brief filed by the plain-

tiffs in error, but in the discussion will reverse the order of topics therein presented.

I.

THE JUDGMENT IN THE MURPHY CASE IS AN ESTOPPEL IN THIS CASE.

The Supreme Court of Utah held that the decision in the Murphy case operated as an estoppel in this case. Since the final adjudication of that case, this one has become a mere moot inquiry, as every matter upon which the rights of the parties can turn was determined against the plaintiffs in error by that adjudication.

The sole plaintiff in that case, as in this, was The Rio Grande Western Railway Company. The present plaintiffs in error, to wit, The Telluride Power Transmission Company and L. L. Nunn, were defendants in that case. That case came to this court for final disposition, where it is known as Telluride Power Transmission Company vs. The Rio Grande Western Railway Company, reported in 175 U. S., page 639, and the parties before this court at that time were identical with the parties now before this court. The subject-matter, so far as it relates to the present plaintiffs in error, was the same as in this case, as will become apparent from a very slight examination of the record.

We append to this brief a blue-print, which shows the route of the railroad of the defendant in error through the canon of Provo river, covering that portion of the territory known as the Murphy land, and a portion of the Ferguson land, involved in this contro-

versy, adjacent to the Murphy land. The two suits were commenced on the same day, to wit, September 12, 1896. (Printed Record, pages 4, 645.) The answer in the Murphy case asserted that the defendants therein (present plaintiffs in error) had made certain surveys in Provo canon, with a view to constructing reservoirs for the preservation of water, and they located the same as follows:

> "Commencing at a point at or near what will be, as nearly as defendants can determine, when surveyed, the *southwest corner of the southeast quarter of section 27, in township 5 south, of range 3 east*, and extending up said canon on both sides of said Provo river a distance of about 5 miles." (Printed Record, page 649.)

The answer then alleges that at or near the corner above referred to, and upon each side of the river, large cliffs of rocks projected from the mountain and approached close together in the bottom of said canon and formed a suitable and proper place for the construction of a dam (Printed Record, page 649.) This is the place which in the record is known as "Hanging Rock."

The answer in the present case alleges the same facts as to survey and attempted appropriation of water, and states that the defendants (present plaintiffs in error)

> "entered upon said public unsurveyed lands of the United States with the design and specific purpose of constructing in said canon,

> at a point at or near what will be, when surveyed, as nearly as defendants can determine, the *southwest quarter of the southeast quarter of section 27, township 5 south, range 3 east*, a dam, by which to reservoir and store said surplus waters of Provo river." (Printed Record, pages 16, 17.)

This, again, is at the same point, to wit, Hanging Rock. No dam above Hanging Rock has been proposed, nor has there been any attempt at appropriation of water by means of a dam farther up the stream than at Hanging Rock. The only other appropriation of water claimed in either case (and it was the same in both cases) was at a diverting dam farther down the canon. Three places figure in the testimony in both cases, as points where the acts of appropriation claimed to have been made or contemplated by the present plaintiffs in error, were situated. These are Hanging Rock, Middle Rock and the diverting dam, from which latter point a flume has been constructed and is in operation in the enterprise of the plaintiffs in error. All of these three places, however, Hanging Rock, Middle Rock and the diverting dam, are situated on the Murphy ground, and there is no pretense of an appropriation higher up the stream by any other structure. Plaintiffs in error now say in their supplemental brief that it can not be said as a matter of law that the plaintiffs in error could not erect their dam just above the Murphy ground and on the Ferguson land. We answer that it can be said, both as matter of law and matter of fact, that no such claim can be made so as to be utilized in this suit, for the simple rea-

son that the answer in this suit, exactly following the answer in the Murphy suit, claimed an appropriation of the water by means of dams situated on the Murphy land and not elsewhere, and no surveys are alleged except in connection with such dams, and for the purpose of marking out the lands that would be flooded by dams constructed at points upon the Murphy land. There can not be, of course, adjudicated in this case, a claim of the plaintiffs in error upon some other appropriation not made, or by virtue of some other dam not located, but rights must turn upon the claim as made in the pending suit. By examining the accompanying blue-print, the relative position of the points in evidence can readily be seen, and while no map exactly like the one here introduced was put in evidence on the trial of this cause, yet the description of points as given in the testimony will show the accuracy of the map, and no contention will be made that it does not correctly represent the position of points in controversy.

Now, the decision in the Murphy case was that the plaintiff was entitled to judgment, quieting its title in the Murphy land, and enjoining the defendants (the present plaintiffs in error), and all persons acting under them,

> "from interfering with the plaintiff, or interrupting it in the use and occupation of said land, and from hindering or obstructing the plaintiff in the construction and operation of railroad thereon and thereover."

And also enjoining the present plaintiffs in error, and each of them,

> "from erecting a dam in Provo river, at any point or place, which will flow a railroad to be constructed by the plaintiff on the grade of the survey now made therefor, on and over said lands." (Printed Record, page 660.)

The present plaintiffs in error are, therefore, absolutely debarred from building the dams which, by their answer in the present Ferguson case, they are relying upon and contending for, and, as the Murphy case has gone to final decree, there is certainly left no right in the present plaintiffs in error to be asserted in this case.

But, more than this, the very questions of alleged appropriation involved in the present case, were involved in the Murphy case, and the findings of fact in that case were distinctly to the effect that no appropriation had, in fact, been made by the present plaintiffs in error. As, however, it is exactly the same appropriation, so-called, that is now relied upon, and not some other or different appropriation, the former decision becomes an adjudication also upon this question of fact, and the question can not now be reopened.

The decision, however, in the Murphy case reaches still further, for when we bear in mind that the evidence as to the appropriation, so-called, made by the present plaintiffs in error, was the same in both cases, relying exactly upon the same acts, and the principles decided in the court below, so far as the rights of the plaintiffs in error are concerned, being the same in the two cases, the decision of this court in the Murphy case on the alleged federal question arising out of section 2339 of the Revised Statutes, is also a mat-

ter of adjudication. In the Murphy case this court said:

> "The position of the plaintiffs in error is that, as their whole case depended upon the rights asserted by them under section 2339, and that, as the courts decided adversely to the rights claimed by them, there was no necessity of a special reference to that statute, relying in this connection upon such cases as *Miller vs. Nicholls*, 4 Wheat., 311; *Satterlee vs. Matthewson*, 2 Pet., 380, 410, and others cited in *Columbia Water Power Co. vs. Columbia Electric Street Railway Co.*, 172 U. S., 475, 488, in which we have held that, if it sufficiently appear from the record that the validity of a state statute was drawn in question as repugnant to the Constitution of the United States and the question was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not in terms specially set up and claimed in the record is not conclusive against a review of the question here. But the difficulty in this case is, that before it could be said that any right or title under a statute of the United States had been denied, *it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws and decisions.* These were local and not federal questions. The jurisdiction of this court in this class of cases

> does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a federal question."
>
> Telluride Power Co. vs. Rio Grande Western Railway Co., 175 U. S., 647.

Now, as the court was there considering the very facts which are presented in this case; as the conclusions of the court below in each case were to the same effect, to wit, that as matter of fact the Telluride Company and Mr. Nunn had not established priority of possession, or a conformity to local customs, laws and decisions, the adjudication upon the so-called federal question has become final and there is nothing left for this court to consider in the present case as to any such alleged federal question.

II.

THE PLAINTIFFS IN ERROR HAVE NOT BEEN DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW BY THE ACTION OF THE STATE OF UTAH OR OTHERWISE.

The theory of the plaintiffs in error seems to be that they were entitled to have various questions of fact submitted to a jury, and that the refusal of the trial court to do so, resulted in depriving them of property without due process of law.

The trial was under a state statute, relating to the exercise of the power of eminent domain. In such

cases the procedure is determined by the law of the forum. The state statute provides for "due process," and for a method of procedure which gives reasonable notice and affords fair opportunity for the defendants to be heard before the issues are decided. Under this procedure the defendants (plaintiffs in error) had their day in court, with ample opportunity to present every question and have it decided according to the law of the state.

It is well settled that, under such circumstances, to refuse a jury trial in a state court is not a denial of a right protected by the Constitution of the United States.

Walker vs. Sauvinet, 92 U. S., 90.

Iowa Central Railway Co. vs. Iowa, 160 U. S., 389.

Allen vs. Georgia, 166 U. S., 138, 140.

Wilson vs. North Carolina, 169 U. S., 589

III.

THE PLAINTIFFS IN ERROR HAVE NOT BEEN DENIED THE EQUAL PROTECTION OF THE LAW, EITHER AS TO ANY RIGHT OR AS TO ANY AUTHORITY GIVEN UNDER A STATUTE OF THE UNITED STATES.

The contention is again made, based on section 2339 of the Revised Statutes, that rights claimed under that statute have been denied by the decision of the state courts.

We may concede that it is not necessary that the answer should have specifically referred to section 2339 by number and designation, but in order to get the benefit of that section it was necessary for the defendants (present plaintiffs in error) to allege and prove facts which would bring them within the protection of section 2339, and this they do not do. The clause of that section which is applicable to the controversy is as follows:

> "Whenever, by priority of possession, rights to the use of water for mining, domestic, agricultural and other purposes have vested and accrued, and the same are recognized and acknowleged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

It will be observed that there are two elements of fact which the claimant under this section must allege and prove: First, that the rights claimed have vested and accrued by reason of priority of possession; and, second, that they have been acquired and are held in a manner recognized and acknowledged by the local customs, laws and the decisions of the courts.

We may concede that the answer alleged a priority of possession, but an issue was formed upon that allegation and the finding and judgment of the court was against the contention of the plaintiffs in error. The trial court found and adjudged

> "that neither on nor before nor since the 8th day of July, 1896, had the defendants, The

> Telluride Power Transmission Company and L. L. Nunn, or either of them, had any possession of the lands sought to be condemned."
>
> Printed Record, page 49.

This was surely a finding and judgment as to a matter of fact.

As to the other element, to wit, that the alleged rights had been acquired and were held in a manner recognized and acknowledged by the local customs, laws and decisions of courts, there is neither allegation in the answer nor proof in the evidence, and, in any event, the finding and adjudication of the court below is against the contention now made, for, in the same finding above referred to, the court holds that these plaintiffs in error had not,

> "by appropriation or otherwise, any right to raise the waters of Provo river so as to flow the same or any part thereof, or any right to the said lands or the possession thereof as part of a reservoir site."

For reasons already urged in this brief, therefore, there is left as to this matter no federal question for the consideration of this court, because the matter turns wholly upon questions of fact.

But, in this connection, the plaintiffs in error urge that they were entitled to certain instructions requested by them to be given to the jury, being their requests numbers 11 and 12. The court will observe, however, that this case was a proceeding in condemnation under the laws of the state of Utah, which pro-

vide a special procedure in cases of eminent domain. Under the laws of Utah, the only matters left to be determined by a jury in condemnation proceedings are as set forth in section 3598 of the Utah statutes, and relate wholly to compensation and damages with the consideration of off-setting benefits, while all other matters are, by section 3596, left to the consideration of the court, and not of the jury. These instructions, therefore, so requested by the plaintiffs in error were properly refused, because they related to the domain of the court, and not to the domain of the jury.

We respectfully submit that, up to this time in this discussion, there has developed no federal question that will invoke the consideration of this court, under the rules which this court has very clearly expressed on numerous occasions.

> "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this

court without considering any federal question that may also have been presented."

California Powder Works vs. Davis, 151 U. S., 389, 393.

Missouri Pacific Railway vs. Fitzgerald, 160 U. S., 556, 576.

Fowler vs. Lamson, 164 U. S., 252, 255.

IV.

THE ACTION OF THE STATE COURT IN DENYING THE PETITION FOR REMOVAL TO THE FEDERAL COURT IS NOT NOW REVIEWABLE IN THIS COURT.

In our original brief we have discussed the proposition that there was no separable controversy involved in this case, and that, therefore, the petition to remove was properly denied, and that in the Circuit Court of the United States the motion to remand was properly sustained. And this conclusion is established by the decisions of this court, cited by Judge Marshall of the United Circuit Court in his opinion remanding this cause; and especially is it supported by the decision of this court in *Bellaire vs. B. & O. R. R. Co.*, 146 U. S., 117, 119.

On the oral argument, however, of this cause, this court called the attention of counsel to the case of *Missouri Pacific Railway Co. vs. Fitzgerald*, 160 U. S., 556. That case very clearly holds that, under the circumstances presented by this record, the action of

the state court in refusing to remove this cause is not now reviewable in this court.

The cases are almost parallel in their facts, so far as relates to this question. In that case, as in this, an application had been made in the state court and was denied. In that case, as in this, the moving parties filed the record in the United States court, and in the meantime proceedings in the state court were suspended. In that case, as in this, the Circuit Court of the United States remanded the case to the state court, holding that it was not a case for federal jurisdiction. In that case, as in this, the suit proceeded in the state court and through its appellate tribunal to final determination by the highest court of the state.

In the decision of that case this court said:

> "If a state court proceeds to judgment in a cause, notwithstanding an application for removal, its ruling in retaining the case will be reviewable here after final judgment under section 709 of the Revised Statutes." (Citing *Stone vs. South Carolina*, 117 U. S., 430.)

But this is manifestly in a case where there has been no attempt to have the action of the state court reviewed by the federal tribunal, for where the decision of the federal court is invoked upon the same question its decision becomes final; and the language of this court in the Fitzgerald case, by the change of the word "Nebraska" to "Utah," would exactly fit the case we now have under consideration. The court uses these words:

"A state court can not be held to have decided against a federal right when it is the Circuit Court, and not the state court, which has denied its possession.

"The Supreme Court of Nebraska rightly recognized the courts of the United States to be the exclusive judges of their own jurisdiction and declined to review the order of the Circuit Court.

"As under the statute a remanding order of the Circuit Court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it can not be reviewed on writ of error to a state court, the prohibition being that 'no appeal or writ of error from the decision of the Circuit Court remanding such cause shall be allowed.' And it is entirely clear that a writ of error can not be maintained under section 709 in respect of such an order where the state court has rendered no decision against a federal right, but simply *accepted the conclusion of the Circuit Court.*"

Missouri Pacific Railway Co. vs. Fitzgerald, 160 U. S., 556, 582-583.

In the case at bar, the Supreme Court of Utah rendered no decision against a federal right, but simply accepted the conclusion of the Circuit Court. (Printed Record, pages 666-7.)

We respectfully submit, therefore, that there is now nothing before this court for consideration under the assignments of error relating to the action of the trial court in denying the removal of this cause.

V.

THE WRIT OF ERROR SHOULD BE DISMISSED OR THE JUDGMENT AFFIRMED, NOT ONLY BECAUSE NO FEDERAL QUESTION IS INVOLVED, BUT BECAUSE THERE IS A DEFECT OF PARTIES.

This subject was discussed in our principal brief, pages 36 to 38. We make, however, the following further suggestions:

The statement as to parties given in the supplemental brief of plaintiffs in error clearly shows that Sarah, Frederick and William Ferguson were parties to the record in the Supreme Court of Utah. They had been made appellees or respondents in that court by notice of appeal served upon them by the present plaintiffs in error, then appellees. The fact that they did not enter appearance in the Supreme Court of Utah does not change the fact that they were parties, having been served with process. They were bound by the judgment of the Supreme Court of Utah, affirming the judgment of the trial court, in which they had appeared and filed answer and cross-complaint. (Printed Record, page 33.) The proceedings resulted in a single award of an amount to be paid by the plaintiff below, now defendant in error. The cause of action was single. The language of this court in a case already cited fits the present case in this matter, as well as upon subjects previously discussed.

> "The object of the suit was to condemn and appropriate to the public use a single lot of land. * * * The cause of action al-

leged, and consequently the subject-matter of the controversy, was whether the whole lot should be condemned, and that controversy was not the less a single and entire one because the two defendants owned distinct interests in the land and might be entitled to separate awards of damages. The ascertaining of these interests and the assessment of those damages were but incidents to the principal controversy and did not make that controversy divisible so that the right of either defendant could be fully determined by itself, apart from the right of the other defendant, and from the main issue between both defendants on the one side and the plaintiff on the other."

Bellaire vs. Baltimore & Ohio R. R., 146 U. S., 117, 119.

We submit that the three Fergusons are essential parties to any determination of this cause, and it was the duty of the plaintiffs in error to bring them before this court by proper proceeding, or to take the necessary steps for severance, and this proposition is abundantly sustained by the authorities cited in our principal brief. And in one of the cases cited in their supplemental brief by the plaintiffs in error the principle for which we are contending is very strongly stated. After speaking of certain possible exceptions to the general rule, this court says:

"Exceptional cases of the kind occasionally arise, but where the interest is joint and the interest of all is affected by the judgment,

> the rule is universal, that all must join in the writ of error, else it is open to the other party to demand that it be dismissed, unless a severance of the parties in interest has been effected by summons and severance, or by some equivalent action appearing in the record."
>
> Simpson vs. Greeley, 20 Wall., 152, 157.

We submit that this writ of error is entirely without merit, and that the judgment of the court below should be affirmed or the writ of error dismissed.

Respectfully submitted,

R. HARKNESS,
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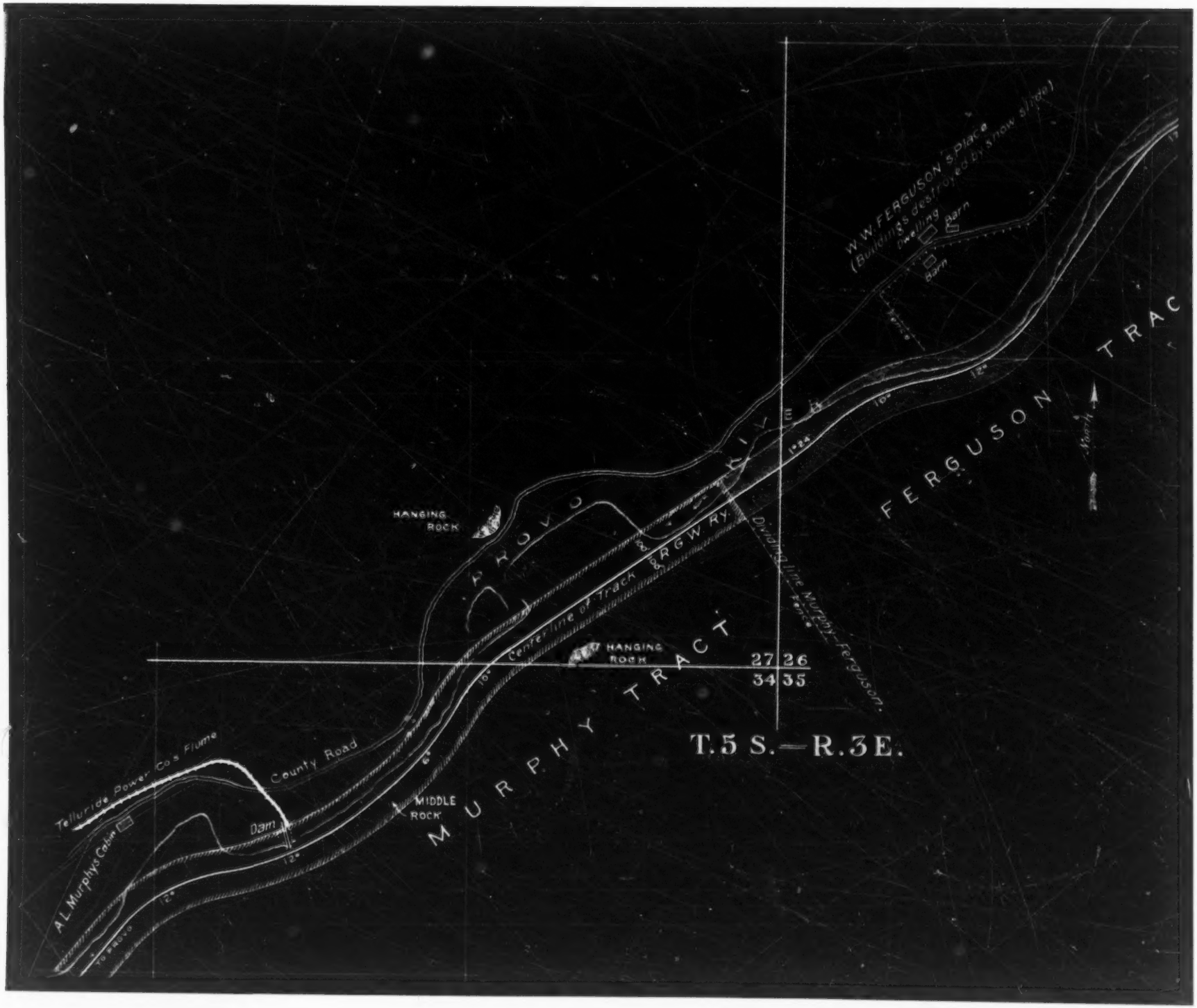
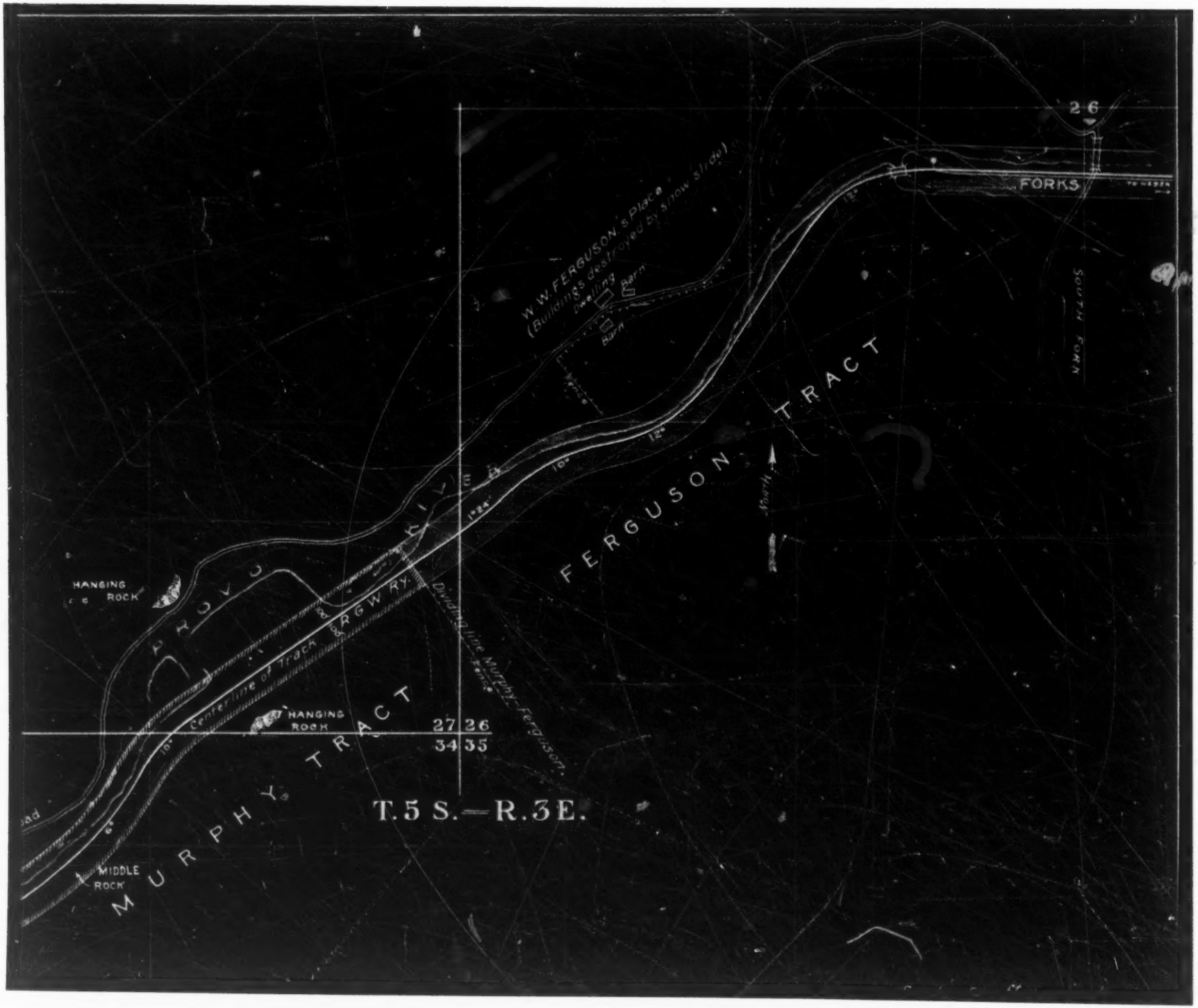
J. F. VAILE,
Attorneys for Defendant in Error.


W. W. FERGUSON'S Place
(Buildings destroyed by Snow slide)
Dwelling
Barn
Barn
Fence
FERGUSON TRAC
North
ARROYO
SLIDE
1924
HANGING ROCK
Center line of Track D&RGW RY
Dividing line Murphy-Ferguson
HANGING ROCK
27 26
34 35
MURPHY TRACT
T.5 S.—R.3E.
Telluride Power Co's Flume
County Road
Dam
MIDDLE ROCK
A.L. Murphy's Cabin
10°
6°
12°
2°
10°
12°


26
FORKS
W.W. FERGUSON'S Place
(Buildings destroyed by Straw Slide)
Dwelling
Barn
Barn
Fence
SOUTH FORK
FERGUSON TRACT
North
12°
10°
1°24'
HANGING ROCK
Center line of Track S.R.G.W.RY.
Dividing line Murphy-Ferguson
HANGING ROCK
27 26
34 35
MURPHY TRACT
T.5 S.—R.3E.
MIDDLE ROCK